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AMERICAN FETISH WORSHIP OF FORMS AND RULES.

We called attention to the comments of some English newspaper criticisms of our jurisprudence (Vol. 64, p. 465) among which was one from the London Outlook to the effect that superior courts in America, do not ask, when an appeal is taken to them, is the judgment just; but rather, is there any error of any kind in the proceedings of the trial court? If there is, the presumption of prejudice exists at once, and the whole cause is tried over again. It is this fetish worship of forms and rules that has made the judicial procedure of America a menace to society.

The truth of this statement finds much evidence to support it. Cases where substantial justice has been done, are frequently sent back because of some technical error, causing great additional expense which might have been avoided by a common sense view of the record, as a whole. The case of Pennsylvania R. Co. v. Smith, 64 Cent. L. J. 393, was an action against a carrier, the declaration averring an undertaking for the carriage of a shipment of scrap iron and steel, and that in consideration of the delivery of the iron and steel the defendants issued three separate bills of lading, and undertook to carry said property to said destination, and to require the surrender of the bills of lading properly indorsed before the delivery; that nevertheless the said defendants delivered the iron and steel without the surrender of said bills of lading properly indorsed, by reason of which disregard of said agreement the said plaintiff has been greatly damaged, etc. The court held that this declaration was not a sufficient statement of a consideration to support defendants' promise and hence stated a cause of action for a tort and not a contract. Had the plaintiff stated his action so as to have given a right of recovery on the action in assumpsit, the facts would have been practically the same, and a recovery had on either statement would have been *res adjudicata*. No sensible reason can be stated why substantial justice would not have been done to have allowed the judgment in that case to stand, but it was held that because the action was so stated as to make it a case in tort, no recovery could be had upon the theory of assumpsit. In this case the court says: "So a complaint, in an action against a common carrier, alleging in general terms a breach of a contract to carry safely certain articles of freight, but further alleging, particularly and specifically, that the defendant so negligently and carelessly conducted in regard to the same that they were greatly damaged, states a cause of action in tort." In either event the main thing was the agreement to carry safely so that if the facts relied upon to recover either in tort or assumpsit are identical, why should it be necessary to send such cases back for trial when it must appear that substantial justice had been done. The damages in either event would be the same.

Now, take the English method of handling the same proposition which is shown in the case of Kelly v. Metropolitan Railway Co., 1 Q. B. D. (1895), 944. Lord Esher said: "In this case the plaintiff was a passenger on the defendants' railway and he has been injured by the act of one of their servants. The case was tried upon the assertion of plaintiff that the servant of the railway was guilty of negligence, and the jury have found to that effect and awarded £25 damages. £20 had been paid into court, and upon this statement of fact arises the question whether the plaintiff is entitled to costs on the county court scale, on the ground set up by the defendants that the action is founded upon contract. On the other side it is contended that the action is one in tort. I do not mean on the pleadings, but that it was brought and tried as one in tort. In old times the question of injury to a passenger through something done by the servants of a railway company gave rise to a dispute whether such an action was an action of contract or one of tort, and it was ultimately settled that the plaintiff might maintain an action either in contract or tort. In the former case he might allege a contract by a railway company to carry him with reasonable care and skill, and it was a breach of that contract; and on the other hand, he might allege that he was carried by the railway company to the knowledge of their servants, who were bound not to injure him by

any negligence on their part, and that if they were negligent that was an action upon which a tort might be brought. At the present time he may frame his claim in either way but he is not bound by the pleadings, and if he puts his claim on the one ground and proves it on another he is not embarrassed by any rules of departure. The question to be tried is the same in either case. * * * The jury have to determine on the facts of the case and if they found there was no negligence, which was the cause of the injury they have in fact tried an action in tort." This gives some meaning to the provision in our codes that actions shall not abate on account of form. If the facts stated are sufficient for the relief granted, substantial justice has been done; and it seems absurd that cases should be sent back for retrial merely for want of form. It is no wonder that English papers ridicule our appellate practice for being so technically silly.

NOTES OF IMPORTANT DECISIONS.

WILLS—WHEN BELIEF IN SPIRITUALISM MAY AFFECT TESTAMENTARY CAPACITY.—While it is now a well settled legal doctrine that a man's religious beliefs in themselves will not be admitted in evidence as proof of insanity or to destroy testamentary capacity, nevertheless it becomes an interesting question whether, if he carries his belief in certain doctrines so far as to affect his mind and control his whole being, actuating every thought and action, he may not be said to lack testamentary capacity. This was the interesting question presented to the court in the recent case of O'Dell v. Goff, 112 N. W. Rep. 736, where the Supreme Court of Michigan held that where a believer in Spiritualism has such confidence in spiritualistic communications through mediums or otherwise that he is impelled to follow them blindly, his free agency is destroyed, and a will made under such circumstances cannot be admitted to probate, whether such conclusion be based on the theory of incapacity or undue influence.

The court, in the course of a very interesting and valuable opinion, said: "Did the testator's belief in Spiritualism destroy his testamentary capacity? His belief in Spiritualism was not evidence of insanity. Bonard's Will, 16 Abb. Prac. (N. S.) 128; Rood on Wills, § 129; *In re* Spencer, 96 Cal. 448, 31 Pac. Rep. 453; Will of J. B. Smith, 52 Wis. 543, 8 N. W. Rep. 616, 9 N. W. Rep. 665, 38 Am. Rep. 756; Buchanan v. Pierie, 54 Atl. Rep. 583, 205 Pa. 123, 97 Am. St. Rep. 725. One accepts his religious faith on evidence that is satisfactory to his mind. A court of law will never inquire whether that faith is sound or unsound. It does not possess the machinery for executing such an undertaking. It will content itself with saying—and that is sufficient for the purposes of this case—that one's religious faith affords no evidence of insanity. It does not follow, however, that one may not have such a faith in Spiritualism as to destroy his testamentary capacity. He may think so continually and persistently on this subject as upon many other subjects as to become a monomaniac, incapable of reasoning where this subject is concerned. In that case it should be said that a will made in consequence of such monomania is void for lack of testamentary capacity. Orchardson v. Cofield, 171 Ill. 14, 14 N. E. Rep. 197, 40 L. R. A. 256, 63 Am. St. Rep. 211. So, too, a believer in Spiritualism may have such extraordinary confidence in spiritualistic communications—whether these communications reach him through mediums or are received by him as he believes directly—that he is impelled to follow them blindly and implicitly, his free agency is destroyed, and he is constrained to do against his will what he is unable to resist. A will made under such circumstances is obviously not the will of testator, and is therefore not admissible to probate. We need not speculate as to the ground upon which this conclusion rests. It is utterly unimportant whether it rests upon the ground of absence of testamentary capacity, or, as held by the trial court, upon the ground of undue influence. See, also, Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473. It is sufficient to say that a will brought about by an influence which the testator could not resist is not his will. Tested by the foregoing principles, which were recognized by the trial court, it cannot be said that there was no evidence upon which these issues should have been submitted to the jury. Indeed, we do not understand that it is claimed that there was no evidence tending to prove that testator was a monomaniac on the subject of Spiritualism. There certainly was such testimony. There was testimony tending to prove that testator's faith in Spiritualism had led him to many strange conclusions; for instance, that on one occasion a spirit brought him a crisp new $5 bill, and that on another occasion a spirit —designated by him as an evil spirit—tried to take his life with a butcher knife when he was lying in bed. There is evidence, too, that his mind dwelt upon the subject of Spiritualism so persistently and profoundly as to make him incapable of reasoning when that subject was concerned. In short, there was evidence tending to prove that he was a monomaniac upon the subject of Spiritualism. It is claimed, however, that there was no testimony tending to prove that the will was procured by undue influence. Undue influence as here used means that spiritualistic communications overcame the testator's mind, and compelled him to make the will in question. There certainly was testimony tending to prove that in making the will testator was influenced

by spiritualistic communications. And it is a significant circumstance (see Matter of Beach, 23 App. Div. 411, 48 N. Y. Supp. 437), already alluded to that many of these communications came through mediums who are both directly and indirectly beneficiaries in the will. From testator's actions and declarations the inference might be drawn that he was incapable of resisting the influence of these communications."

CONTRACT—WHETHER DAMAGES RESULTING FROM BREACH OF CONTRACT TO ERECT BUILDING ARE NOT SUFFICIENTLY SPECIFIC OR TOO SPECULATIVE.—A lawyer assumes a heavy obligation when he undertakes to advise a client as to the commencement of an action where a counterclaim is impliedly threatened. In some cases he brings his client into court as a plaintiff seeking relief and comes out with a judgment against him for the relief of the defendant. This was the result in the recent case of Iowa-Minnesota Land Co. v. Conner, 112 N. W. Rep. 820, where the plaintiff brought suit to collect a balance of $2,225 due on a contract with defendant's intestate for the purchase of a section of land in Minnesota. The defendant set up a counterclaim for $3,125 damages for failure of plaintiff to carry out an agreement to erect a large store building on the adjoining tract and conduct the business of general merchandising. The jury rendered judgment for defendant for $372 which was affirmed on appeal. The plaintiffs on appeal insisted that the cause of action set up in the counterclaim was too uncertain and indefinite to support a judgment and that the damages claimed were too remote and speculative. On both of these points the Supreme Court of Iowa differed with appellees and expressed themselves as follows: "The deceased purchased section 13, in township 138 north, of range 28 west, of the fifth P. M., in Crow Wing county, Minnesota, on the 17th of March, 1903, and as a part of the contract, it was agreed that the said Iowa-Minnesota Land Company shall erect, or cause to be erected, either by themselves or some other party, a store building on the above described land at some convenient place to be hereafter agreed on by the said Iowa-Minnesota Land Company and the said N. McDonald; said site, however, to be not more than 40 rods from the right of way of the present railroad running through the above described land, said building to be erected during the season of 1903, a stock of general merchandise to be kept therein and a general merchandise business carried on. This was undertaken, it must be assumed, as a part of the consideration for which the purchase price was paid. The plaintiff objected to the introduction of this contract in evidence on three grounds: (1) That the stipulation with respect to the erection of a store building and placing a stock of goods therein was too indefinite to be enforced; (2) that the duty of seeing that a site was selected devolved upon deceased as a condition precedent; and (3) that the damages resulting from a breach were too remote and speculative. Taking these propositions up in the order named, it must be conceded that the contract is not as specific as it might have been. This, however, is not an action for specific performance. Had it been, some difficulty might be experienced in determining the size of the building to be erected, as well as the extent of the stock of goods to be installed. It is to be presumed, however, that such a store and stock were contemplated by the parties as would fairly accommodate the trade at that locality. The plaintiff was bound under this agreement to erect a building reasonably adapted to use as a store, and to install a stock of goods such as might reasonably be expected to meet the needs of the community. That such improvements need not be more specifically described in order to render the party promising to make them liable for failing to do so appears from Wilson v. Yocum, 77 Iowa, 569, 42 N. W. Rep. 446. See Fraley v. Bentley, 46 N. W. Rep. 506, 1 Dak. 25. In the first of these cases none of the improvements agreed to be made were described, and yet the court held the agreement sufficiently specific as a basis for damages. It is said that the building would be of no consequence without a stock of goods, and that the agreement does not provide that the stock is to be placed in the building by plaintiff, or that it is to carry on a general mercantile business. It is stipulated, however, that the stock shall be kept therein and the business carried on. While plaintiff did not undertake to do this, it did agree that this would be done. No time within which the stock was to be installed is expressly indicated, but the rule is well settled that, where a person undertakes to do a thing, it is to be inferred that he will perform within a reasonable time. The erection of a building necessarily must have preceded the installation of the stock, and, as neither was done, there was a breach of both undertakings. We think the contract sufficiently definite under the decision cited to render plaintiff liable for its breach. The location of the store was 'to be hereafter agreed upon between' the parties. Appellant insists that an agreement on the location was a condition precedent to the right of action, and that such an agreement or an excuse for not making it should have been alleged in the petition and proven. The time for the erection of the building was specified, so that no demand was essential. It was to be located at a convenient point on the premises not more than 40 rods from the right of way of the railroad. It was optional with the plaintiff when it would begin the building, as the contract only required that it be constructed within a certain time. No affirmative action was essential on the part of the deceased to render the stipulation binding. If he refused to negotiate or agree with respect to a suitable location, that was a matter of excuse or defense for not erecting the building. The burden was upon the plaintiff to

perform its obligation, and, until it had indicated its purpose to do so, deceased was not called upon to act. The plaintiff was required to do all that was necessary for its part in order to construct the building within the time stipulated. McDonald was not in default, and could not have been, save by refusing to agree upon a site. To hold otherwise would require the deceased to take the initiative in the matter of carrying out the obligation plaintiff had undertaken. It was only incumbent on the executors to prove the plaintiff's breach; and, if this was due to the fault of deceased, that was a matter of defense.

The executors alleged that had this store building been erected and the stock of goods installed as agreed the value of the section of land would have been enhanced thereby, and the evidence tending so to show, and under the ruling of Wilson v. Yocum, *supra*, the defendants were entitled to recover on their counterclaim the amount, if any, that the improvement would have increased such value. In that case the writer of the opinion undertook to distinguish it from First National Bank v. Thurman, 69 Iowa, 693, 25 N. W. Rep. 909. In the Wilson case the measure of damages alleged was the extent to which the improvements, if made, would have increased the value of the land, while in First National Bank v. Thurman, such measure was averred to be the difference between the value of the plaintiff's building as it was and would have been had the improvement been made as agreed. The distinction, if any, was too fine for some members of the cour , as it had been for the writer who ruled on the demurrer in the Wilson case at *nisi prius*. The doctrine of Wilson v. Yocum, however, has our approval, and sustains the conclusion that the damages claimed by defendants are neither remote nor speculative. They may be uncertain and difficult of ascertainment but this furnished no reason for not allowing such as may be proven under the well-established rules of evidence. Hichhorn v. Bradley, 117 Iowa, 130, 90 N. W. Rep. 592. Rule v. McGregor, 117 Iowa, 419, 90 N. W. Rep. 811."

IDENTITY OF ISSUES ON APPEAL FROM JUSTICE'S COURT.

1. *General Rule.*—An important rule of practice in a number of jurisdictions requires that on appeal from a justice of the peace, the cause of action cannot be changed and that the case must be tried on the same issues as in the lower court[1] except where issues have arisen subsequently such as payment, release, etc. In most of these jurisdictions the rule appears to be wholly judicial[2] in origin and independent of express legislative enactment (though there is generally a statute[3] providing that the trial on appeal shall be *de novo*) so that it not only requires a different construction from a mere statutory rule[4] but the decisions construing it are applicable to other jurisdictions where no statute covering the subject is in force; and where it has not yet been judicially declared.

2. *Rationale.*—The reason for the rule has been stated as follows:

"The rule is intended to prevent the proceedings in the tribunal of original jurisdiction from degenerating into a mere farce, by requiring the parties to present the controversy fully and in good faith to that tribunal, and to prevent them from making a sham prosecution or defense in the first instance and trying the cause afterward upon its merits in the higher court. Designed to effect this object, the rule requires parties to

[1] *General Rule*—California: People v. El Dorado County Court, 10 Cal. 19. Nebraska: Inglehart v. Lull (Neb.), 90 N. W. Rep. 762, 95 *Id.* 25, where the Nebraska authorities are reviewed; Jacob North & Co. v. Angelo, 105 N. W. Rep. 1089; Ball v. Beaumont, 88 N. W. Rep. 173 (but cf. 81 N. W. Rep. 858); Bellamy v. Chambers, 50 Neb. 146, 69 N. W. Rep. 770; Cf. Holub v. Mitchell, 42 Neb. 289, 60 N. W. Rep. 567, and Nebraska cases cited, *infra passim*. Philippines: Alonso v. Placer, IV. Off. Gaz. 223; Enriquez v. A. S. Watson & Co., *Id.* 446. And see generally 31 Cent. Dig., Column 1746-7, 1755-7.

[2] Inglehart v. Lull (Neb.), 95 N. W. Rep. 25.

[3] Cal. Code Civ. Proc. (1901), sec. 980; Philippine Code Civ. Proc. (1901), sec. 75; Cf. Neb. Code Civ. Proc., sec. 1010.

[4] "As the rule is commonly stated, the cause must be tried in the appellate court upon the same issues that were presented in the court from which the appeal was taken, except as new matter may have arisen after the trial. Relying upon the technical meaning of this word 'issue,' counsel for plaintiff in error contend that since, except in case of a counterclaim, where a bill of particulars may be required, or in cases where an affidavit is necessary under section 1100a, Code Civ. Proc., a defendant in justice's court may set up as many defenses as he may have, whether affirmative or by way of denial, without any pleading or written statement whatever, every defense other than those required to be stated in writing in the special cases mentioned is of necessity an issue, and may be set up in the district court on appeal, whether presented to or relied upon before the justice's court or not. If the rule were statutory, and we were bound absolutely by the exact form in which it is commonly expressed, it would probably be true that the use of the word 'issue' in this connection would justify such a contention. But the rule is judicial, not statutory, and an examination of the cases in which it has been announced shows at once that it has a wider scope than that to which plaintiff in error would confine it, and that it would be deprived of force, and the reason for its existence would be largely impaired, if we gave it such a construction." Inglehart v. Lull (Neb.), 95 N. W. Rep. 25.

present the same case in the district court which they presented to the inferior tribunal. It is not a question of issues solely, in the technical sense of that term, but of the case which was actually presented."[5]

3. Exemplifications—(a) *Affirmative Defenses.*—Thus, under the general rule above stated, an affirmative defense,[6] such as payment or want of consideration,[7] forgery,[8] or the statute of limitations,[9] cannot be raised for the first time in the appellate court.

What Constitutes a Change of Issues.[10]—Setting up a verbal contract instead of a statutory right is a change of issues within the meaning of this rule,[11] so is suing on a written warrant in the appellate court if the action below was on an account.[12]

(b) *Counter Claims, etc.*—By virtue of this doctrine a counter claim or set-off not presented in the lower court is excluded from consideration on appeal.[13]

(c) *Parties.*—Where the bill of particulars in the justice's court allege services rendered to a partnership and the petition in the appellate court claim compensation from either parties, it was held that the issues were changed.[14] But the mere fact that the parties on appeal are different from those named in the summons from the lower court is not fatal, if amendment was in fact duly made in that court.[15] So it is not a violation of the rule to omit on appeal one of several parties defendant below.[16]

4. Qualifications of the Rule—(a) *New Pleadings Permitted.*—In the absence of a different showing in the appellate court it will there be presumed that the defense presented by defendant below was at least equivalent to a general denial,[17] hence it is permissible for him to file such pleading on appeal though none was presented below.[18] In jurisdictions where a reply is required in the appellate court but not in the lower court plaintiff may, of course, file such reply for the first time on appeal.[19]

(b) *Language of Pleadings Need Not Be Identical.*—The rule does not go to the extent of requiring that the party state his cause of action or defense in precisely the same language on appeal as in the lower court,[20] thus the statement of the cause of action may be particularized in the appellate court without changing the issues.[21] And where, in an action of replevin, an averment of conversion was added on appeal, it was held not to infringe the rule.[22]

(c) *Enlarging Claim, etc.*—On a principle somewhat similar to that last mentioned, it has been held permissible to increase in the appellate court the amount claimed as damages, the breach of the same contract being alleged,[23] but the amount as thus amended must not exceed that which would have been cognizable by a justice of the peace.[24] The evidence need not, of course, be the same in both courts.[25]

5. *Enforcement—Remedy.*—In order to avail himself of the benefits of this rule the party prejudiced by its infraction must move to strike from the pleadings the new issues as soon as they are presented; he cannot wait until the trial and then insist on the exclusion of evidence in support thereof.[26] This rule

[5] *Id.*, p. 26.
[6] Bishop v. Stephens, 31 Neb. 786, 48 N. W. Rep. 826.
[7] Lee v. Walker, 35 Neb. 689, 53 N. W. Rep. 597.
[8] First Nat. Bank v. Carson, 30 Neb. 104, 46 N. W. Rep. 276.
[9] Halbert v. Rosenbalm, 49Neb. 498, 68 N. W. Rep. 625.
[10] See note 4, *supra*, as to the meaning of "issues."
[11] Robertson v. Hamilton (Neb.), 86 N. W. Rep. 493.
[12] Fuller v. Schroeder, 20 Neb. 631, 31 N. W. Rep. 109.
[13] Darner v. Daggett, 35 Neb. 695, 53 N. W. Rep. 608; O'Leary v. Iskey, 12 Neb. 136, 10 N. W. Rep. 576.
[14] Jacob North & Co. v. Angel (Neb.), 105 N. W. Rep. 1089.
[15] Hartzell v. McClurg (Neb.), 74 N. W. Rep. 625.
[16] Lamb v. Thompson, 31 Neb. 448, 48 N. W. Rep. 58.
[17] Carr v. Lusher, 35 Neb. — , 53 N. W. Rep. 144, holding however, that nothing more would be presumed. The later case of Cobbey v. Buchanan, 48 Neb. 391, 67 N. W. Rep. 167, appears to be somewhat inconsistent with the case last cited but it does not refer to or discuss the later.
[18] Mullins v. So. O. St. Ry. Co. (Neb.), 99 N. W. Rep. 521.
[19] C. B. & Q. R. Co. v. Gustin (Neb.), 52 N. W Rep. 844.
[20] Brockway v. Reynolds (Neb.), 109 N. W. Rep. 154, and cases cited.
[21] German Nat. Bank v. Aultman (Neb.), 88 N. W. Rep. 479, 57 N. W. Rep. 386; Citizens State Bank v. Pence, 59 Neb. 579, 81 N. W. Rep. 623.
[22] Livingston v. Moore (Neb.), 89 N. W. Rep. 289.
[23] Piano Mfg. Co. v. Nortrom (Neb.), 88 N. W. Rep. 164.
[24] U. P. R. Co. v. Ogilvy, 18 Neb. 638, 26 N. W. Rep. 464.
[25] Sells v. Hapgood, 21 Neb. 360, 32 N. W. Rep. 66.
[26] Grainger v. Bank, 88 N. W. Rep. 121; Levi v. Fred, 38 Neb. 564, 57 N. W. Rep. 386; Lee v. Walker, 35 Neb. 689, 53 N. W. Rep. 597; Robertson v. Bank,

is, of course, inapplicable where, as is often permitted by statute, the party relies upon his pleadings in the lower court, and no new pleadings are presented on appeal.[27]

6. *Proof of Infraction.*—While the record should always be resorted to for the purpose of determining what were the issues below and whether they have been changed, there is well considered authority for the proposition that if the record fails to disclose such information, parol evidence is admissible on the point in question.[28]

CHARLES SUMNER LOBINGIER,
Judge of the Court of First Instance.
Manila, P. I.

May 1, 1907.

40 Neb. 235, 58 N. W. Rep. 715; Sawyer v. Brown, 17 Neb. 171, 22 N. W. Rep. 355.

[27] Fitzgerald's Estate v. Bank (Neb.), 90 N. W. Rep. 994.

[28] Inglehart v. Lull (Neb.), 90 N. W. Rep. 762; (on rehearing, 95 *Id.* 25), which contains an exhaustive review of the authorities in the particular jurisdiction involved as well as a valuable discussion of the point on principle.

ABSTRACTS OF TITLE—LIABILITY OF ABSTRACTER.

EQUITABLE BUILDING & LOAN ASSN. v. BANK OF COMMERCE & TRUST CO.

Supreme Court of Tennessee, June 1, 1907.

An abstracter furnished an abstract of title, which referred in the body of the abstract to a will executed by an owner and purported to set out its contents as devising the property in fee, while it only devised a life estate. Held, that the abstracter failed to exercise a proper degree of care and skill, and a customer, injured in relying on the abstract, was entitled to recover.

An abstracter furnished an abstract to a husband, who delivered it to a building association to procure a loan. The attorney of the association, on examining the abstract, reported that the title was in the wife. Thereupon the wife made application to the association for a loan, and the association, in reliance on the statement in the abstract, advanced money to her. The abstract contained an error rendering the title defective. The abstracter had no knowledge of the purpose for which the husband intended to use the abstract. Held, that the building association could not maintain an action against the abstracter; there being no privity between them.

This suit was brought to recover the sum of $1,891.21 and interest thereon, alleged to have been lost by reason of a defect in an abstract of title issued by the Buck Abstract Company, the property of which was acquired by the Memphis Abstract Company; the Bank of Commerce & Trust Company conceding its liability for the debts of the latter.

The abstract was obtained and used under the following circumstances:

T. J. Fox intermarried with Lizzie Oltmann, and, desiring to use his wife's property to enable him to procure a loan, applied through a third party, one Haynes, to the Equitable Building & Loan Association for certain shares of stock and for a loan of $2.500, in accordance with the building and loan laws. He was advised, through his agent, that it was necessary to procure an abstract of title, and he thereupon ordered such abstract from the Buck Abstract Company. At the time this abstract was ordered the Buck Abstract Company was not informed of the purpose for which it was to be used, and it never at any time had knowledge of that purpose. The abstract was delivered to Mr. Fox, and by him to his agent, Haynes, who in turn delivered it to the building and loan association. After an examination by the attorney of the association, he reported that the title was in Mrs. I. F. Fox in fee. Thereupon Mrs. Fox made application to thebuilding and loan association for a loan, and the association advanced her the sum of $2,600, less premiums, taking a trust deed upon her interest in the property covered by the abstract. Mrs. Fox became delinquent in her payments, and the property was advertised for sale under the trust deed. It was then discovered that she had only a life estate, and the sale was abandoned. Notice was given to the Bank of Commerce & Trust Company that the building and loan association would look to it to protect it against any loss it might suffer by reason of an alleged defect in the abstract of title. It was agreed by all parties to endeavor to get Mrs. Fox to pay as much of the debt as possible; the rights of neither party to be prejudiced by the delay or the agreement. Mrs. Fox died shortly afterward, and all her interest in the property ceased. Thereupon the building and loan association began this suit.

The defect in the abstract complained of is in the item numbered 19, which is a reference to the will of Elizabeth Oltmann, who was the mother of Mrs. Fox. This will as abstracted is as follows:

"No. 19, Will Book 11, Page 307.

	Instrument.	Date.	Filing.	Remarks.
Elizabeth Oltmann to Her Daughters Lizzie and Lona	Will.	June 8th, 1891.	June 8th, 1891.	

"Consideration, $———. Proved and admitted to record June 8th, 1891.

"Conveys * * * to Lizzie the house and lot N. E. corner Greenlaw and 4th street, 74 1-4x74 1-4 feet, and S. part of lot on which I now live, being so much of said lot as lies south of the

line running half way between the two brick houses on said lot—the part here conveyed had on it a single tenement brick— * * * to her sole and separate use, etc. To Lona * * * other property."

Without referring to the records to examine the original will, or the will as recorded in the county clerk's office, the attorney for the association interpreted the above note as purporting a devise of an estate in fee to Mrs. Fox in the property described, and so reported to his client, the building and loan association. If the will, as recorded in Will Book 11, at page 307, referred to in the abstract, had been examined, it would have been shown that the devise was in the following language: "To have and to hold to her, the said Lizzie, for and during her natural life, for her sole and separate use, free from the debts, contracts and control of any husband she may have, and at her death to the heirs of her body forever."

Mrs. Fox left children surviving her, and at her death the remainder vested in them in accordance with the terms of the will. The certificate attached to the abstract is in these words: "The foregoing abstract, consisting of 23 instruments, contains all conveyances of the property mentioned in the caption thereof, of date since February 14, 1857, shown as No. 1 therein, of record in the register's office of Shelby county, Tennessee, prior to this 16th day of January, 1901, at 9 o'clock a. m., except as to W. 1-2 lot 149, which is a continuation from June 23, 1884.

"[Signed] R. M. Buck Abstract Co.,
"R. M. Buck, Gen. Mgr.

"Prepared for T. J. Fox."

The will of Elizabeth Oltmann was not of record in the register's office of Shelby county, but was of record in the will book above referred to.

The chancellor rendered a decree against the Bank of Commerce & Trust Company for the full amount sued for, with interest. From this decree the company appealed to this court and has assigned errors.

The errors assigned are: (1) That the abstract of title is not defective; (2) that the defect complained of was in the will of Elizabeth Oltmann, and that the contract of the abstract company was to furnish an abstract only of such instruments as were of record in the register's office, and that this will was not of record in that office; (3) that there was no privity of contract between the building and loan association and the abstract company."

NEIL, J. (after stating the facts): We shall consider the first and second assignments in the reverse order.

1. Although the certificate refers only to the register's office of Shelby county, and wills are not recorded there, but in the county court clerk's office, yet, since the body of the abstract refers, for No. 19, to the will book, and purports to state its substance, and this No. 19 was required to make the complement of 23 instruments mentioned in the aggregate in the certificate, the contract of the parties must be held to apply to that instrument, and there can be no doubt in fact that it was so intended and understood by the parties. Thomas v. Carson, 46 Neb. 765, 65 N. W. Rep. 899 (cited by the appellant's counsel) does not cover such a state of facts. In that case the certificate covered instruments only in "the county clerk's office, office of the district court clerk and treasurer's office." The two mortgages, the knowledge of which would have prevented the plaintiff from investing and losing his money, were in the register's office, which had been in existence only about one year. The court said the entries upon the abstract were in all resepects true; hence there was no breach of contract. There was not in that case, as in the present one, a reference upon the face of the abstract to an instrument, and a report, not mentioned in terms in the certificate, but embraced by necessary construction therein.

2. We think the abstract company was guilty of negligence in the report which it made on the will of Mrs. Elizabeth Oltmann. An abstracter may content himself with presenting a mere index to the records, and if such a paper be accepted by his customer the latter cannot complain. Such a paper could be delivered and accepted only under a mutual expectation that the customer would examine the records referred to for himself. Compare Moot v. Business Men's Investment Ass'n, 157 N. Y. 201, 52 N. E. 1, 45 L. R. A. 666. But where the abstract purports to state the contents or substance of a deed, will, or other instrument, and there is nothing upon the face of the abstract to indicate a mistake or error, the customer is justified in relying upon it, without making an original investigation, and is not guilty of negligence in so doing. If there is in fact an error in the abstract, and through reliance upon it the customer has sustained injury, he may hold the abstracter liable therefor to the extent of the injury sustained, provided the error complained of is such as could have been avoided by the exercise of ordinary care and skill on the part of one possessing qualifications adapted to the business of abstracting. National Savings Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621; Banker v. Caldwell, 3 Minn. 94 (Gil. 46); Kane v. Rippey, 22 Oreg. 296, 23 Pac. Rep. 180; Heinsen v. Lamb, 117 Ill. 549, 7 N. E. Rep. 75; Wacek v. Frink, 51 Minn. 282, 53 N. W. Rep. 633, 38 Am. St. Rep. 502; Young v. Lohr, 118 Iowa, 624, 92 N. W. Rep. 684; Rankin v. Schaefer, 4 Mo. App. 108; Keuthan v. St. Louis Trust Co., 73 S. W. Rep. 334, 338, 339, 101 Mo. App. 1; Dickle v. Abtract Co., 89 Tenn. 432, 14 S. W. Rep. 896, 24 Am. St. Rep. 616; 1 Cyc. 213, 214, 218; 1 Am. & Eng. Ency. of Law, 210, 218, 221.

Applying the foregoing principles to the case in hand, we are of opinion that an abstracter, exercising a proper degree of care and skill, would have seen the importance of noting the fact that Mrs. Oltmann's will gave to Mrs. Lizzie

Fox. the daughter of the testatrix, only a life estate in the property.

3. We are of the opinionr, however, that the third assignment must be sustained. There was no privity between the abstract company and the Equitable Building & Loan Association. The ground of action against the abstracter is in contract, and not in tort, and the weight of authority is to the effect that the abstracter is liable only to the person to whom he furnishes the abstract, and that he is not liable to a third person, to whom his customer presents and with whom his customer uses the abstract in the procurement of money or property, unless there is a republication of the abstract to such third person. Nat. Savings Bank v. Ward, *supra;* Talpey v. Wright, 61 Ark. 275, 32 S. W. Rep. 1072, 54 Am. St. Rep. 206; Dundee Mortgage Co. v. Hughes (C. C.), 20 Fed. Rep. 39; Mallory v. Ferguson, 50 Kan. 685, 32 Pac. Rep. 410, 22 L. R. A. 99; Symns v. Cutter, 59 Pac. Rep. 671, 9 Kan. App. 210; Schade v. Gehner, 34 S. W. Rep. 576, 133 Mo. 252; Glawatz v. People's Guaranty Search Co., 63 N. Y. Supp. 691, 49 App. Div. 465; Zweigardt v. Birdseye, 57 Mo. App. 462; Siewers v. Commonwealth, 87 Pa. 15.

There are some cases which we should note as holding that privity existed under the special circumstances appearing therein. In Young v. Lohr, *supra*, it was held that the abstracter was liable to the owner, though the contract was by the owner's agent, who did not disclose his principal. In Western Loan & Savings Co. v. Silver Bow Abstract Co., 78 Pac. Rep. 774, 31 Mont. 448, 107 Am. St. Rep. 435, it was held that where, though defendant abstract company had arrangements with plaintiff loan association by which abstracts were furnished at the cost of borrowers from the association to be used by plaintiff, defendant agreed to furnish the abstract in question in that case for plaintiff, and delivered it, knowing that it was made for plaintiff's exclusive benefit and use, and that plaintiff would rely thereon, there was sufficient privity of contract to enable plaintiff to recover the damages sustained by reason of a failure of the abstract to disclose an unsatisfied judgment against the land referred to therein.

In Economy Building & Loan Association v. West Jersey Title & Guaranty Co., 44 Atl. Rep. 854, 64 N. J. Law, 27, it was held that a count disclosing that plaintiff agreed to lend money to an applicant upon condition that he should secure the loan by mortgage on real estate certified to be a first lien thereon by a title company having corporate capacity so to do; that the borrower applied to the company and made known to it his agreement with plaintiff; that he requested the company to make the required search and certificate; that it agreed to do so, and to deliver the certificate to the borrower to be delivered to the plaintiff, to be used for the purpose of procuring the loan; and that the company did make the certificate and deliver it to the borrower, who paid for it, and by its use obtained the loan—showed a contract on the part of the company, including an undertaking to use care in certifying truly as to previous incumbrances, upon which, in case the company carelessly and untruthfully certified that a certain mortgage was a first lien, when in fact there was a previous recorded mortgage on the land, the plaintiff had a good cause of action if injured thereby.

In Dickle v. Abstract Co., 89 Tenn. 431, 14 S. W. Rep. 894, 24 Am. St. Rep. 616, it appeared that Dickle was negotiating with Bowman for the purchase of land, but declined to complete the purchase until they were furnished with an abstract of title; that Bowman thereupon applied to the company to make the abstract, which was done, and Bowman paid for it, and the abstract was delivered to him, and was shown to Dickle, and in reliance upon it he completed the purchase—the deed from Bowman to Dickle being prepared by the abstract company. There were two conveyances omitted from the abstract, by reason of which Dickle was injured. These were the allegations of a bill in equity brought against the abstract company for relief. The court held that these allegations showed a privity of contract between Dickle and the abstract company.

In Denton v. Title Company, 112 Tenn. 320, 79 S. W. Rep. 799, the preceding case was followed, and applied to a case where the vendor and vendee together paid for the abstract; each paying one-half. The vendor, however, alone applied in person to the company for the abstract, and it was furnished to him; but it was known to the officers of the company that he was procuring it for the purpose of making a sale of his property, and for the purpose of satisfying prospective purchasers. On these facts the court held that Denton, being the immediate purchaser of the land from the person to whom the abstract was issued, and the defendant knowing that it was procured to be used in making a sale of property, the complainant, Denton, was entitled to the benefit of it, and could sue for material defects therein, causing injury.

In the case before the court, as shown by the statement, the abstract company issued the abstract to T. F. Fox, without any knowledge on the part of the company of the purpose for which it was intended to be used. It was presented by Mrs. Fox to the complainant, and money was lent by the latter to her. There was no privity whatever between the complainant and the abstract company.

It results that the judgment of the court below must be reversed, and the bill dismissed.

NOTE—*Liability of Abstracter of Titles to Third Persons.*—The liability of abstracters of title as such is a comparatively recent question of law owing to the fact that the abstracter is himself a new fixture in the progress of business life and activity. Heretofore in England and America the duties now performed by abstracters were part of the regular practice of solicitors and attorneys at law. In the progress of time and with the accumulation of extensive records, it became necessary to employ a middleman known as the abstracter, who was expected to have a working knowledge or indexes to all this mass of records, and was to be employed only to gather together in convenient form and logical arrangement all the evidences of title and incumbrances which appeared of record as affecting the title to every piece of real estate in any community. The skill to be demanded of such abstracters was not that of an attorney, but merely that which might be reasonably expected of any one charged with a simple ministerial act, to-wit, that he be familiar with his indexes and records and that his examination be reasonably accurate. He was in no sense to be a guarantor of the title to be examined, but merely warranted that his researches into the records was with the same knowledge and skill possessed by abstracters generally, and that his posting of the record was with that degree of accuracy which would be ordinarily expected from one with the experience necessarily acquired in such a business.

The next question to arise in connection with the liability of the abstracter was to determine to whom he stood in privity and for whose damage he was liable. In 1890 the Supreme Court of Tennessee, in the case of Dickle v. Abstract Co., 89 Tenn. 431, decided this question without argument, holding that the maker of an abstract of title to real property, guaranteed by him to be correct, is answerable in damages to the purchaser of such property, who relied upon the abstract, and refused to purchase without it, if recorded conveyances are omitted therefrom to his injury, though the abstract was made at the request of the owner and delivered to the intending purchaser for examination. There being very few, if any authorities of this question at that time, this decision aroused some comment from annotators who generally considered it to be founded in error. The annotator of the American State Reports, for instance, in an annotation to that case (24 Am. St. Rep. 617), offered the following observation: "There was a difficulty in holding the defendant liable, in the principal case, which does not seem to have been fairly met, or at all considered by the court. So far as it appears from the opinion, the person in whose favor the action was brought did not apply to the searcher of records for the abstract of title, nor was he in any respect brought in any contract relation with him. Undoubtedly the searcher was liable to the person who employed him for any negligence, or for the want of skill and ability requisite to the performance of the duties he undertook to discharge. But, as a general rule, where a liability arises out of contract, or out of a failure of a person to perform something which he has agreed to do, none but the parties to the contract can maintain any action for the breach thereof, or for negligence or want of skill in its performance. Upon this principle, attorneys at law making mistakes in the examination of titles have generally been held liable only to their employers and not to third persons who may happen to act on the certificate or opinion given. National Savings Bank v. Ward, 100 U. S. 195. Upon principle, we do not see why the rule thus applied to attorneys is not equally applicable to searchers of records who do not happen to be also attorneys at law."

The case of National Savings Bank v. Ward, 100 U. S. 195, cited by the learned annotator of the American State Reports in the preceding quotation is a leading and interesting case on this question. In this case it appeared that A, an attorney at law, employed and paid solely by B to examine and report on the title of the latter to a certain lot of ground, gave over his signature this certificate: "B's title to the lot" (describing it) "is good, and the property is unincumbered." C, with whom A had no contract or communication, relied upon this certificate as true, and loaned money to B, upon the latter executing a deed of trust as security therefor. B, before employing A, had transferred the lot in fee by a duly recorded conveyance, a fact which A, on examining the record, could have ascertained, had he exercised a reasonable degree of care. The money loaned not being recoverable from B, C sues A for the amount to which he was damaged. The court by a vote of five to three held A not liable on the ground that there being no fraud or collusion proven or alleged to exist between A and B, there could be no other ground of liability because of a total lack of privity of contract between A and C. The court further held that proof of local usage or custom that abstracters were presumed to act for the lender in such cases as well as the borrower was not effective for the purpose of making a contract where none was made by the parties. The whole argument of Judge Clifford in this case clusters around the central proposition of a lawyer's liability to his client or third persons for professional services rendered. We are going to interpolate a suggestion right here that abstracting as practiced today at least in our large cities is largely ministerial and is executed by men who in most cases are not lawyers. This fact together with the present methods and customs of conveying might call for the application of different principles than those controlling the relation and liability of attorney and client. In order to distinguish this authority from some other observations which we shall make later on, and with which this case migh seem to conflict, we desire to call special attention to the fact that Judge Clifford excepts certain conditions of fact from his opinion and thus very narrowly limits its extent. He calls attention, pp. 197, 199, to the fact first, that the arrangements were made wholly between A and B and that A never once came into contact with C; second, that no fraud or collusion was alleged or proved to exist between A and B to deceive C or any one else; third, that A did not even know the use which B desired to make of the abstract nor did he know to whom it was to be offered or that it was to be used at all.

Chief Justice Waite and Justices Swayne and Bradley strongly dissented in the National Savings Bank case and this dissent is certain to lead to some extent to a modification of the prevailing doctrine. Justice Waite practically sums up his position in the following sentence: "I think if a lawyer, employed to examine and certify to the recorded title of real property, gives his client a certificate which he knows, or ought to know, is to be used by the client in some business transaction with another person as evidence of the facts certified to, he is liable to such person relying on his certificate for any loss resulting from his failure to find on record a conveyance affecting the title, which by the use of ordinary professional care and skill, he might have found." While there is no doubt

in our mind as to the soundness of the majority opinion in this case especially as limited to the particular facts so clearly defined by Judge Clifford, we nevertheless believe that the minority position states an exception to the general rule that would be applicable to a state of facts where the abstracter sought to be held liable knew the purpose for which the abstract was to be used and that, practically, he was making the abstract, not for the use and benefit of his client, but for the person with whom his client was dealing. When there is such an understanding the abstracter is practically making his abstract under contract with his client for the benefit of a third person, the purchaser or lender, and this particular third person is thus drawn into privity of contract with the abstracter. We do not say that this is yet fully recognized as an exception to the general rule, but we offer this argument as tenable ground from which to make a legitimate breach in the rule guaranteeing absolute protection to the abstracter so far as regards third parties.

We shall briefly examine the principal authorities, supporting the general rule that the abstracter is not liable to third persons for damages resulting from reliance upon an abstract which was negligently and incorrectly prepared. We first call attention to the case of Talpey v. Wright, 61 Ark. 275, 54 Am. St. Rep. 206. In this case the opinion is distinctly limited by the fact that the abstracter did not know who the abstract was for, nor that it was to be used at all. In distinguishing the Dickle case, the court said: "There is no intimation, in the opinion or elsewhere, that there was any want of knowledge on the part of the abstract company in regard either to the purpose or the person for whose information and benefit the abstract was intended. So far as we can ascertain, the action was based on a contract made by the abstract company with Bowman to prepare an abstract for the use, benefit and information of Dickle. That being the case, it was held Dickle had a right of action for injury to him occasioned by the negligence of the abstract company in preparing such abstract." The Arkansas Supreme Court, therefore, practically agrees with the suggestion we make in the preceding paragraph and holds that, observing the distinction noted, "there is no irreconcilable conflict" between the Dickle case and the National Savings Bank case. In the Talpey case the third person was quite remote. A, the abstracter, made an abstract at the request of B, the owner, for the benefit of C, the lender, who afterwards assigned his loan to D, the plaintiff, who brings suit against A for a fault in the abstract. There is clearly no liability in such a case. The court clearly intimates, however, that C would probably have had a good cause of action.

The case of Mallory v. Ferguson, 50 Kan. 685, 22 L. R. A. 99, does not carefully consider the question before us, but approves the general rule that abstracters are not liable to persons other than those with whom they directly contract. To same effect, Symns v. Cutter (Kan.), 59 Pac. Rep. 671. The court in this case, however, implies an exception in cases where abstracter knew for whom the abstract was made. The Missouri cases, however, not only hold in conformity with the prevailing rule but attach no significance to the *scienter* doctrine, holding that the fact that the abstracter has knowledge that the certificate as to title is to be used in a sale or loan to advise the purchaser or loaner, does not affect the general rule and make him liable to the purchaser or loaner. Zweigardt v. Birdseye, 57 Mo. App. 462; Schade v. Gehner, 133 Mo. 252. In the last case cited the supreme court leaves a loop-hole for further expansion of the doctrine so rigidly defined in the Zweigardt case, in the following clause: "The cases cited by the appellant's counsel upon this branch of the case, upon examination, will not be found to be repugnant to this doctrine, but to hold that the particular circumstances of those cases brought the party injured, though not the party directly employing the abstracter, into privity with his contract, and created a duty to him as well as to his immediate employer."

In the case of Dundee Mortgage & Trust Investment Co. v. Hughes, 20 Fed. Rep. 39, the facts disclose that A applied to a money lender for a loan of $3,000, and offered his note therefor, secured by a mortgage on certain real estate property; B, the attorney of the money-lender, examined the title to the real property and furnished the latter a certificate to the effect that A's title was good and the property unincumbered, and thereupon the loan was made upon the terms proposed; subsequently and before the maturity of the note it was assigned to the plaintiff, who foreclosed the mortgage and sold the property, when it was found that it was incumbered by a prior mortgage, so that the plaintiff did not realize the amount of his debt. The United States Circuit Court for the district of Oregon held that there being no privity of contract between B and the plaintiff, the former was not liable to the latter for the loss. This case is clearly within the general rule, as the abstract was made for the lender and there was at that time no other person in view for whose benefit it could have possibly been made and, therefore, there could be no possible ground for the application of the supposed doctrine of *scienter* or of an implication of privity arising from circumstances surrounding the transaction. To the same effect: Talpey v. Wright, 61 Ark. 275, 32 S. W. Rep. 1072; Day v. Reynolds, 23 Hun, 131; Mechanics' Building Assn. v. Whitacre, 92 Ind. 547.

There is a line of cases, other than the Dickle case first mentioned, which, by the way, is not satisfactory in its reasoning and altogether too general in its conclusions, which offer and suggest strong grounds for modifying to some extent the rigidity of the general rule. Thus, take the case of Houseman v. Girard Mutual Building & Loan Assn., 81 Pa. St. 256. In this case A applied to B for a loan on a certain piece of real estate. B intended to make the examination himself, but not having time employed or requested A to secure him an abstract. A went to C, the recorder of deeds, whose duty it is to make certificates of searches, and obtained a certificate from him that there were no mortgages on A's property, which certificate was false. The court held that C was liable since A was acting as the agent of B and made the application for the sole purpose and "in order that he might obtain a loan of money on mortgage from the defendants, and the certificates were so used, and the money so obtained." A further question arose in this case, to-wit, whether the knowledge of A that there were unsatisfied mortgages still on the property was chargeable to B, as his principal in this transaction, but the court held that such knowledge would not be imputed to the lender who requests the borrower to procure an abstract. The same rule was maintained in the later case of Peabody Building & Loan Association v. Houseman, 89 Pa. St. 261, where the same recorder of deeds was held liable on almost the identical state of facts, the distinction in this case being that C, the recorder, deliberately omitted certain mortgages from his certificate at the request of A, the borrower, on

the latter's assurance that he would at once satisfy them. Judge Paxon said: "The defendant's search clerk knew when he issued the searches that the plaintiffs were about to loan money upon the faith of them. He omitted the mortgages in question, upon Leslie's assurance that he would 'have them satisfied out of the money he was to receive from the association.' The recorder has no right to throw the disastrous results of the misplaced confidence of his clerk upon those who loaned their money upon the faith of his official certificate."

Under a statute in Nebraska (Sec. 65, ch. 73, Comp. Stat. 1897), requiring abstracters to execute a bond "conditioned for the payment by such abstracters of any and all damages that may accrue to any party or parties by reason of any error, deficiency, or mistake in any abstract or certificate of title made and issued by such person or persons," it has been held that the general rule at common law limiting the liability of abstracters to those with whom they are in privity of contract is abrogated and that any one who purchases real estate on the faith of a certificate of title furnished to his vendor by a bonded abstracter may maintain an action for damages grounded on the failure of the abstracter to make a proper search and true certificate. Gate City Abstract Co. v. Post, 55 Neb. 742, 76 N. W. Rep. 471.

One of the strongest and best reasoned cases departing from the rigidity of the general rule is that of Brown v. Sims, 22 Ind. App. 317, where the rule is laid down, and buttressed by unanswerable argument, that where the abstracter, although employed by the owner of the property, has knowledge of the purpose for which it is to be used, and especially where he is expressly informed by the lender that he is lending money on the strength of such abstract, in such a case the abstracter is brought into such privity of contract with the lender as to make him liable to the latter for negligence in the preparation of the abstract. To same effect Siewers v. Commonwealth, 87 Pa. St. 15. We are very strongly inclined to believe that the two cases just cited state a very legitimate exception to the general rule. Indeed, we believe they are altogether in harmony with the general rule. Where an abstracter is definitely informed either by the owner or by the purchaser or lender, that the abstract is not for the use of the owner but for the use and benefit of some third person, definitely indicated to the abstracter, in such case the latter is brought into privity of contract with such third person as being the person for whose use and benefit the contract is made, and is liable to such third person for injuries sustained by the abstracter's negligence in preparing the abstract. And we are not so sure but that the rule should be extended to the degree indicated by Chief Justice Waite, in his dissenting opinion in the case of Savings' Bank v. Ward, *supra*, to-wit, that where the abstracter knows, or *ought to know*, because of any particular circumstance or the nature of the transaction or of his employment, the purpose or the party for whose benefit the abstract is made, he should be held liable for damages to such third persons either on the ground of implied privity of contract or on the doctrine of *scienter*. The usual practice is for the purchaser or lender, at their own expense, to request or employ the owner of the property to procure the abstract or to continue an old abstract already in his possession. In such cases the owner is practically the agent of the purchaser or lender, and where an abstracter knows, or ought to know such conditions to exist, he should be presumed to be contracting not with the owner but with the real principal in the transaction, to-wit, the purchaser or the lender.

A. H. ROBBINS.

JETSAM AND FLOTSAM.

MODERN DEVELOPMENTS OF THE JURISDICTION OF EQUITY.

The principle, followed so long by courts of equity, that chancery interferes only to protect rights of property, has recently lost much of its vigor because the courts, though often professing allegiance to the rule, have stretched the term "property" almost beyond recognition in the effort to do justice in the constantly arising situations where personal and political rights demand adequate protection. Accordingly, the injunctive method of abating nuisances, originally designed to prevent injuries to property, has been used where what was actually protected was the individual's personal comfort (Soltau v. DeHeld (1851), 2 Sim. N. S. 133), health (Dennis v. Eckhardt (Pa., 1862), 3 Grant Cas. 390, or safety. McKillopp v. Taylor (1874), 25 N. J. Eq. 139. For the nature of rights in a dead body, in which there is no purely proprietary right, (5 Columbia Law Review, 543), the vague term "*quasi*-property" has been suggested, so that equity might take jurisdiction in situations of peculiar emergency. Pierce v. Proprietors (1872), 10 R. I. 227. The writer of private letters has been held to possess a property in them sufficient to prevent their unauthorized publication. Woolsey v. Judd (N. Y. 1885), 4 Duer, 379. Even the right of privacy has been termed a proprietary right in order that it might safely receive equitable protection. Edison v. Edison Polyform Co. (N. J. 1907), 67 Atl. Rep. 392; cf. Roberson v. Rochester Folding Box Co. (1901), 171 N. Y. 540, 564 (dissenting opinion); Schuyler v. Curtis (1895), 147 N. Y. 434, 453 (dissenting opinion). Emboldened by the tendency to resort to this fiction, courts have occasionally ventured to repudiate proprietary right as the sole criterion of equitable intervention, and to extend the jurisdiction when a situation of exceptional force seemed to demand it. Marks v. Jaffa (N. Y. 1893), 6 Misc. 290, since overruled (right of privacy); Pavesich v. Life Ins. Co. (1904), (*dictum*, because suit was at law). And the decisions of *In re* Debs (1894), 158 U. S. 564, and People v. Tool (Colo. 1905), 86 Pac. Rep. 224, have established the use of the injunction as an aid to the federal and state governments without further need of a fiction. 7 Columbia Law Review, 357. The candor of these isolated decisions and the caution of the others have left the law in an unsettled condition. The attitude taken by the Court of Errors and Appeals of New Jersey in two recent decisions is not, therefore, surprising, for while ostensibly adhering to the old fiction, it expressed its sympathy with the new and liberal interpretation of equity's power. Cf. *In re* Debs, *supra*. In one case the wife of the aged and sickly plaintiff, John Vanderbilt, committed adultery with a third party, by whom she had a child. She gave it her husband's name, and by means of fraudulent misrepresentations induced the attending physician to certify that the plaintiff was its father. This birth certificate was by the laws of the state evidential to prove the paternity of the child; and if, after the plaintiff's death, such evidence should remain uncontroverted, the child would inherit considerable real estate under the terms of a New York

trust in which the plaintiff had a vested remainder. The plaintff asked for a decree cancelling so much of the certificate as was false, and enjoining its use as evidence. In the other suit John's brother Oliver, whose contingent remainder in the same trust estate would be lost should the child be held to be John's son, alleged the same facts and sought a similar decree. In both cases the court, by Dill, J., ably vindicated the jurisdiction of chancery to grant full relief. Vanderbilt v. Mitchell (N. J. 1907), 67 Atl. Rep. 97, 103, reversing 67 Atl. Rep. 1106, 1107. The points actually decided were expressly limited to two: (1) The court had power to cancel so much of the certificate as was false. (2) The plaintiffs' property rights were threatened to such a degree as to entitle them to injunctions. That they were so threatened is clear. The risk which John ran of liability to support the child was itself enough to ground an injunction. Routh v. Webster (1847), 10 Beav. 561, semble; Walter v. Ashton, L. R. (1902), 2 Ch. 282, semble. Coupled with this were the unwarranted use of his name (Brown Chemical Co. v. Meyer (1890), 139 U. S. 540, 544), which might expose him to liability (Walter v. Ashton, *supra*), and the risk of litigation after his death, which might invalidate his will should he leave more than half his estate to charity (see N. Y. R. S. 1901, "Wills," § 25), thus imperiling a property right, the testator's *jus disponendi*. O'Neill v. Supreme Council (1904), 70 N. J. Law, 411. Oliver's contingent remainder was jeopardized, which gave him a standing. Berwick v. Whitfield (1734), 3 P. Wms. 268 n.; University v. Tucker (1888), 31 W. Va. 621.

The cancellation decreed in the principal cases raises a novel point because of the evidentiary character given the certificate. Courts of equity have inherent power to "correct mistakes and wrong in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights." Johnson v. Towsley (1871), 13 Wall. 72. This doctrine has been applied to cancel fraudulent judgments (Harris v. Cornell (1875), 80 Ill. 54; Doughty v. Doughty (1876), 27 N. J. Eq. 315), awards (Emerson v. Udall (1841), 13 Vt. 477), patents and other public records. Garland v. Wynn (U. S. 1857), 20 How. 6; Lytle v. Arkansas (U. S. 1859), 22 How. 193. And in a recent New York case, (Randozzo v. Roppolo (1906), 105 N. Y. Supp. 481), the court effected a virtual cancellation of a marriage certificate obtained by fraud, by enjoining the defendant from claiming under the certificate and ordering a reference to the decree endorsed upon it. There are no exact precedents for either this case or Vanderbilt v. Mitchell; but in view of the opportunities which the evidentiary character of marriage and birth certificates offer for fraud, and of the frequent cancellation of other official records, the doctrine of the principal cases is a justifiable application of old principles to a new situation. As the New Jersey statute provided for no correction of the record, it seems at least a plausible construction of this and of the merely directory statute of New York (2 Birdseye R. S. Health Law, Sec. 22, p. 2810, L. 1904, ch. 392), that the legislative intention was not to rob the court of its inherent power of correction. Nor should the conceded impossibility of cancelling the whole record (since a child was in fact born) prevent the cancellation of the false part. It is for the correction of errors that the jurisdiction exists; and if this can be accomplished without destroying the whole record, such a situation would seem favorable for relief.

Besides the points actually decided, however, the court made it plain "that if it appeared in this case that only the complainant's *status* and personal rights were thus threatened," it would "hold, and without hesitation, that an individual has rights, other than property rights, which he can enforce in a court of equity," and would "declare that the complainant was entitled to a decree establishing the truth as to the paternity of the child." These *dicta* emphasize the liberal interpretation which the New Jersey courts have put upon their chancery jurisdiction, and seem to advance into a fresh field, the control of equity over personal *status*. Yet in America it is usually held that where a marriage is tainted with fraud or duress, equity preserves its inherent power to annul contracts on such grounds, and may declare the marriage null and void. Ferlat v. Gonjon (N. Y. 1825), 1 Hopk. Ch. 478; Keyes v. Keyes (1851), 22 N. H. 553; Carris v. Carris (1873), 24 N. J. Eq. 516. The refusal of the English Chancery to interfere in such cases has been attributed to the presence of other competent tribunals rather than to lack of jurisdiction. Griffin v. Griffin (1872), 47 N. Y. 134; but see Moss v. Moss, L. R. (1897) Prob. 263. In this country courts of equity have, even in the absence of fraud, rendered decrees of nullity in the cases of marriages of lunatics (Waymire v. Jetmore (1872), 22 Ohio St. 271; True v. Ranney (1850), 21 N. H. 52), and marriages made in jest, (McClurg v. Terry (1870), 21 N. J. Eq. 225), though they have refused to annul marriages for impotence. Anonymous (1873), 24 N. J. Eq. 19, and cruelty. Perry v. Perry (N. Y. 1831), 2 Paige Ch. 501. Occasionally they have assumed power, independently of statute, to grant divorces (Cast v. Cast (1873), 1 Utah, 112; Rose v. Rose (1849), 9 Ark. 507, *dictum*; Stebbens v. Anthony (1880), 5 Colo. 348, *dictum*); and when, in the course of a bill for an accounting, it became necessary to determine the validity of a marriage and the legitimacy of children, the jurisdiction to do so was upheld. Fornshill v. Murray (Md. 1828), 1 Bland's Ch. 479. Consequently, although it is true, broadly speaking, that the remedies of establishing and destroying personal *status* did not belong to the original jurisdiction of Chancery (1 Pom. Eq. Jur., § 112, p. 123), some slender framework of authority surely does exist for an expansion of equity's powers in this direction. There seems no good reason why, having virtually exploded the property rights theory, courts of equity should not proceed, in the exercise of proper caution, to avoid conflict with criminal laws and constitutions, and interference with the other departments of the government, to extend relief in each successive situation in which, through inadequacy of other romedy, the personal, civil or political rights of states or individuals are menaced with invasion. The principal cases are significant as indicating a strong tendency towards such a conception of equity's powers.—*Columbia Law Review.*

BOOK REVIEWS.

CAMPBELL'S INDEX-DIGEST, VOLUME 2, OF NEW YORK COURT OF APPEALS DECISIONS, 1902-1907.

Volume 1 of this very valuable digest was published in 1901. The same plan in this supplemental digest has been pursued which was so faithfully carried out in volume 1. The very high standing of the opinions of the New York Court of Appeals renders their consultation necessary to any lawyer having an important legal

subject for examination. It therefore goes without saying that a well prepared key to their contents becomes a valuable aid. The busy lawyer who consults New York Reports, although he may not own a set of them, but visits the public law library for such consultations, will find it greatly to his advantage to own these two volumes of Index-Digest for frequent reference, and such reference will be greatly facilitated by its excellent arrangement. It cites the exact page of the opinion on which the point digested may be found, as well as the first page of the case, thereby saving the user many tedious hours turning pages to find the matter required. The importantpoints digested are stated in the shortest form and smallest space, consistent with clearness, and without unnecessary multiplication of words.

The author, Colin P. Campbell, is well known to the readers of the CENTRAL LAW JOURNAL. His name has frequently appeared in our columns as author of some of our best leading articles. His work on this Index-Digest is not less thoroughly done than his many legal essays published in this Journal.

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HUMOR OF THE LAW.

A pretty girl went to a famous New York lawyer last month and asked him to conduct a breach of promise case for her.

"What evidence have you?" asked the noted jurist.

"Evidence in plenty," replied the broken hearted one. Then she burst into tears and added: "In the first place he always called on me in a business suit and—and—and in the second he has married another girl!"

When General B. F. Butler's office was in Pemberton Square, a druggist called on him for advice. The druggist said he had just finished remodeling his store, putting in fancy shelving, etc., and that when all was done the landlord had raised his rent. He told the landlord that before he would pay the additional rent he would move and the landlord said: "You can move if you want to; but according to the law in Massachusetts you can't draw a nail in that new shelving."

Butler looked toward the ceiling a moment; then, turning to the druggist, he said: "Your landlord is right. According to the law, you cannot draw a nail, but you can easily remove the shelves." Then his voice assumed a louder tone, as he said: "There is no law under God's heaven that will prevent driving those nails in."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ADVERSE POSSESSION—Hostile Character.—Where P took possession of land under a deed conveying it to him in trust for C, and there was no evidence that he ever made any claim or title to the land in suit adverse to C, or her heirs up to the time of his death, his possession was not adverse to C or her heirs.—Houghton v. Pierce, Mo., 102 S. W. Rep. 553.

2. ALTERATION OF INSTRUMENTS—Rights of Parties.—Where a grantee of land, through *mesne* conveyances, was present at the time the deed from the original grantor was executed, and knew of a reservation therein, he was bound thereby, and could not thereafter claim under the deed as it read with the reservation erased.—Waller v. Ward, Ky., 101 S. W. Rep. 841.

3. APPEAL AND ERROR—Argument of Counsel.—Mere objection to the argument of the state's attorney in a criminal case, without calling for a ruling, presented nothing for review on appeal unless the argument was so flagrantly wrong and prejudicial that the error could not have been cured.—Taylor v. State, Ark., 102 S. W. Rep. 367.

4. APPEAL AND ERROR—Allowance of Costs.—The question whether a case is difficult, so as to authorize an additional allowance in favor of the successful party, is reviewable in the court of appeals on appeal.—Campbell v. Emslie, N. Y., 81 N. E. Rep. 458.

5. APPEAL AND ERROR—Conflicting Evidence.—Where there was a conflict in the evidence on material points, but plenty of evidence which, if believed, would justify the jury in its verdict, it will not be disturbed on appeal.—Brennan v. City of Seattle, Wash., 90 Pac. Rep. 434.

6. APPEAL AND ERROR—Effect of Filing Additional Abstract.—Where a party files an additional abstract to supply matters omitted in the original abstract, he waives any other objection to it than as indicated in the additional abstract.—Eliot v. Kansas City, Ft. S. & M. R. Co., Mo., 102 S. W. Rep. 532.

7. APPEAL AND ERROR—Finding of Referee.—Where a cause is referred to a referee to find and report the facts and conclusions of law, and no bill of exceptions is allowed by the referee, the court connot consider the sufficiency of the evidence.—Iralson v. Stang, Okla., 90 Pac Rep. 446.

8. APPEAL AND ERROR—Insufficient Abstract.—Where appellant's abstract is deficient, the supreme court will not explore the record to ascertain the facts.—Van Patten v. Wank, Ark., 102 S.W. Rep. 371.

9. APPEAL AND ERROR—Manifest Error.—Where a claim was allowed against an estate, and upon the face of the record proper it was apparent that it was not allowable, objection cannot be taken at any stage of the case whether or not a motion for new trial or in arrest was filed below.—Beall v. Graham, Mo., 102 S. W. Rep. 636.

10. APPEAL AND ERROR—Question of Law.—Where a party has obtained instructions submitting certain questions to the jury, he cannot shift his position on appeal and contend that they were questions of law for the determination of the court.—Sawyer v. Walker, Mo., 102 S. W. Rep. 544.

11. APPEAL AND ERROR—Sufficiency of Bond.—An appeal bond naming as obligee "The Grayson County National Bank," instead of "The Grayson County National Bank of Sherman," is good where the obligee is otherwise sufficiently identified.—Wandelohr v. Rainey, Tex., 101 S. W. Rep. 1155.

12. APPEAL AND ERROR—Transactions Between Attorney and Client.—Where defendant occupied a confidential relation toward testatrix, in order to sustain the validity of her assignment to him, the master must affirmatively find against the presumption to the contrary that there was no undue influence.—Taylor v. Vail, Vt., 66 Atl. Rep. 820.

13. ASSIGNMENT FOR BENEFIT OF CREDITORS—Purchase by Assignee.—Where an assignee for the benefit of creditors sold property and then repurchased the same while still acting as assignee, the purchase was voidable at the election of the creditors, and the assignee was liable to them for the property or its value.—Nabours v. McCord, Tex., 101 S. W. Rep. 1152.

14. ATTORNEY AND CLIENT—Attorney Acting for Both Parties.—Where defendant occupied a confidential relation toward testatrix, the lawyers who acted as advisers for her in a transaction with defendant could also act for defendant in drawing the necessary papers and in giving him necessary advice.—Taylor v. Vail, Vt., 66 Atl. Rep. 820.

15. BAILMENT—Right of Removal.—Where tenant removes boilers owned by landlord from building, and places therein leased boilers, and defaults, the lessors of the boilers can assume possession of their property without restoring the old boilers.—Wetherill v. Gallagher, Pa., 66 Atl. Rep. 849.

16. BANKRUPTCY—Discharge as Against Judgment for Willful Injury.—The exception of the bankrupt act from the operation of the discharge of judgments in actions "for willful and malicious injuries to the person or property of another" extends to all actions in which the facts of intent and malice are judicially ascertained by direction of law, however the act may have been characterized by the allegations in the pleadings.—Flanders v. Mullin, Vt., 66 Atl. Rep. 789.

17. BANKRUPTCY—Foreclosure of Liens.—The owner of a promissory note, secured by mortgage and vendor's lien on property thereafter becoming part of the payor's homestead, held entitled, in a suit brought by authority of the court wherein the payor's estate was being administered in bankruptcy against his trustee in bankruptcy, to foreclose his liens on the property before the note was due.—Jungbecker v. Huber, Tex., 101 S. W. Rep. 552.

18. BENEFIT SOCIETIES—Estoppel.—A fraternal insurance organization held estopped to deny that it had no power under its by-laws to insure decedent for the reason that he was more than 45 years of age at the time his application was made.—Admonds v. Modern Woodmen of America, Mo., 102 S. W. Rep. 601.

19. BENEFIT SOCIETIES—Vested Interest.—The beneficiary in an ordinary life insurance policy takes a vested interest which cannot be affected by the acts of the insured, unless the policy contains a reservation that the insured may change the beneficiary or assign the policy, etc.—McNeill v. Chinn, Tex., 101 S. W. Rep. 465.

20. BILLS AND NOTES—Defenses.—In a suit on a nonnegotiable note, the equities existing between the original parties thereto constitute a good defense against a purchaser for value before maturity and without notice of existing equities.—Gilley v. Harrell, Tenn., 101 S. W. Rep. 424.

21. BILLS AND NOTES—Assignment.—Where plaintiff received the assignment of a note payable to W as trustee, he is presumed to have had full knowledge of the condition under which it was executed.—McLeod v. Despain, Oreg., 90 Pac. Rep. 492.

22. BOUNDARIES—Establishment.—In an equitable proceeding to determine a disputed boundary, it was necessary for the plaintiff to show that some of the land in respect of which relief was sought was in the possession of the defendant.—Watkins v. Childs, Vt., 66 Atl. Rep. 805.

23. CANCELLATION OF INSTRUMENTS—Failure of Consideration.—One who had given a note secured by a deed of trust held not entitled to a cancellation of the instruments because of defendant's failure to fulfill the promise which induced the execution of the instruments.—Carter v. Ware Commission Co., Tex., 101 S. W. Rep. 524.

24. CARRIERS—Assumed Risk.—One riding on a logging truck of a logging company held not to assume the risk of collision through the company's negligence with another of its trains.—Harvey v. Deep River Logging Co., Oreg., 90 Pac. Rep. 501.

25. CARRIERS—Defective Tracks.—A carrier's duty to exercise the highest degree of care to passengers in the maintenance of its track and the operation of the train held to extend to a passenger attempting to pass from one car to another of a moving train.—Galveston H. & S. A. Ry. Co. v. Patillo, Tex., 101 S. W. Rep. 492.

26. CARRIERS—Stipulations Against Liability.—A contract between a railroad company and an express company for the transportation of the latter's express matter and messengers held not within the rule forbidding railroad company to stipulate against its liability.—Robinson v. St. Johnsbury & L. C. R. Co., Vt., 66 Atl. Rep. 814.

27. CONSTITUTIONAL LAW—Liquor License Tax.—Acts 1906, p. 549, imposing a license tax on the business of compounding, rectifying, etc., distilled spirits, held not in conflict with Const. U. S. Amend. 14.—Brown-Foreman Co. v Commonwealth, Ky., 101 S. W. Rep. 321.

28. CONSTITUTIONAL LAW—Municipal Improvements.—Local Improvement Act 1897 (Laws 1897, p. 101), providing for the levying of assessments for street improvements, is not in violation of Const. art. 2, § 2, on the ground that it provides no notice to the owner of property assessed.—McChesney v. City of Chicago, Ill., 81 N. E. Rep. 435.

29. CONSTITUTIONAL LAW—Regulation of Automobiles.—Laws 1903, p. 162, regulating the operation and speed of automobiles on the highways of the state, fixing the amount of license, and prescribing a penalty for violating the same, was not unconstitutional as class legislation.—State v. Swagerty, Mo., 102 S. W. Rep. 483.

30. CONTEMPT—Power to Punish.—In order to give court jurisdiction to punish for contempt committed without the presence of court, accused must be served with statement of charge against him and be given opportunity to answer the charge.—Reymert v. Smith, Cal., 90 Pac. Rep. 470.

31. CORPORATIONS—Consolidation.—Where a railroad substantially complied with the law authorizing a consolidation, and had exercised the rights of a railroad for 17 years, held, that its corporate existence could not be collaterally attacked.—Smith v. Cleveland, C., C. & St. L. Ry. Co., Ind., 81 N. E. Rep. 501.

32. CORPORATIONS—Corporate Name on Sign.—Placing the letters "Inc.," after the corporate name, instead of the word "Incorporated" under it held not a compliance with Ky. St. 1903, § 576, which provides that corporations shall place their corporate names and immediately thereunder the word "incorporated" on their places of business.—Commonwealth v. American Snuff Co., Ky., 101 S. W. Rep. 364.

33. CORPORATIONS—Right to Declare Dividend.—The property of a corporation must first be appropriated to the debts of the company before any portion of it can be distributed to the stockholders of the company.—Montgomery v. Whitehead, Colo., 90 Pac. Rep. 509.

34. COSTS—Additional Allowance.—Where the material facts on the issue whether a case is difficult and extraordinary, so as to authorize an additional allowance in favor of the successful party, are not disputed, the question is one of law for the court.—Campbell v. Emslie, N. Y., 81 N. E. Rep. 458.

35. COVENANTS—Action for Breach.—Where title to land sold with a warranty fails, the warrantor is liable whether the warrantee was told by him or otherwise knew that part of it was fenced by another.—Mayer & Schmidt v. Wooten, Tex., 102 S. W. Rep. 423.

36. COVENANTS—Failure of Title.—A grantee in a deed with covenants of warranty, defending an action for an outstanding dower interest in the premises, held entitled to recover from the grantor the amount of the judgment establishing the dower interest.—Olmstead v. Rawson, N. Y., 81 N. E. Rep. 456.

37. CRIMINAL EVIDENCE—Conspiracy.—Where the existence of a conspiracy has been sufficiently established, the declarations of a co-conspirator, although not made in the presence of accused, are competent against him.—Hall v. Commonwealth, Ky., 101 S. W. Rep. 376.

38. CRIMINAL TRIAL—Argument of Counsel.—The court on appeal in a criminal case held not authorized to consider the objection of accused to the argument of the prosecuting attorney, in view of the failure to object or accept at the time the argument was made.—France v. Commonwealth, Ky., 100 S. W. Rep. 1193.

39. CRIMINAL TRIAL—Depositions.—Where the prosecuting attorney had notice of the taking of a deposition, and permitted defendants to read it in evidence without objection or motion to suppress, it was improper for the court to permit the prosecuting attorney to examine one of defendant's counsel for the purpose of discrediting the deposition.—State v. Barnett, Mo., 102 S. W. Rep. 506.

40. CRIMINAL TRIAL—Instructions.—The trial court's failure in a criminal case to charge on any proposition deemed essential by accused is not error unless he made a request for an instruction.—People v. White, Cal., 90 Pac. Rep. 471.

41. CRIMINAL TRIAL—Misconduct of Witness.—In a murder trial, fact that decedent's mother shed tears, sobbed, etc., held not ground for reversal of a conviction.—Vaugun v. State, Tex., 101 S. W. Rep. 445.

42. CRIMINAL TRIAL—Reference to Stenographic Notes.—Where, in a murder trial, dispute arose between defendant's counsel and jurors as to what a witness stated, held not error to refuse to allow the stenographic report of the testimony to be read.—Vaughn v. State, Tex., 101 S. W. Rep. 445.

43. DAMAGES—Medical Expenses.—In an action by a passenger for personal injuries, it is error, in giving an instruction on the elements of recovery, to include the expenses of medical treatment, unless there is evidence thereof.—St. Louis, I. M. & S. Ry. Co. v. Leamons, Ark., 102 S. W. Rep. 363.

44. DEATH—Damages.—In an action for wrongful death, the court properly refused to confine a recovery to mere nominal damages, even though the evidence failed to show the amount deceased was earning at the time of his death.—Sipple v. Laclede Gaslight Co., Mo., 102 S. W. Rep. 608.

45. DEEDS—Construction.—Plaintiff held to have waived his right to claim a forfeiture of land conveyed for a violation of a restriction in the deed by later conveying parts of the same tract without the restrictions.—Brown v. Wrightman, Cal., 90 Pac. Rep. 467.

46. DEEDS—Construction.—Where a deed in granting clause conveyed the property in fee simple, a proviso that, should the grantee die without issue and before her husband, the property was to revert to her husband, was void.—Carl Lee v. Ellsberry, Ark., 101 S. W. Rep. 407.

47. DEEDS—Construction.—Where a deed is evidently drawn by one not skilled in such work, greater latitude is permitted and less attention paid to technical words in construing the instrument than would otherwise be the case.—Miller v. Mowers, Ill., 81 N. E. Rep. 420.

48. DEEDS—Particular and General Description.—It being apparent that a call from a deed has been omitted by mistake or inadvertence, the court will read into the deed the omitted call so that the result intended by the parties may be accomplished.—Cornett v. Creech, Ky., 100 S. W. Rep. 1188.

49. DIVORCE—Rights of Child.—An infant is not devested by a judgment to which he was not a party, divorcing his parents and giving the custody of the infant to the mother, of his right to the care and support of his father.—Sipple v. Laclede Gaslight Co., Mo., 102 S. W. Rep. 608.

50. DRAINS—Water Courses.—A natural or prescriptive water course may be made available as a conduit for the discharge of the waters of a public drain, at least where the augmented flow would not tax the stream beyond its capacity.—Hart v. Scott, Ind., 81 N. E. Rep. 481.

51. EASEMENTS—Severance of Dominant and Servient Estates.—By purchase of a dominant estate and sublease, a defendant held to have the right of enjoyment of a waterway to the extent that it had been used theretofore.—Hall v. Morton, Mo., 102 S. W. Rep. 570.

52. EJECTMENT—Property Subject to Action.—An action of ejectment by a city will not lie for land in which it claims an easement for park purposes, but does not claim the legal title.—Canton Co. of Baltimore v. City of Baltimore, Md., 66 Atl. Rep. 679.

53. ELECTIONS—Disqualification of Candidate.—Where a candidate for office was disqualified, but had it within his power to remove the disqualification, it cannot be asserted that the electors were guilty of willful obstinacy and misconduct, so that their votes should be treated as nullities.—Hoy v. State, Ind., 81 N. E. Rep. 509.

54. ELECTRICITY—Injury to Servant of Another Company.—A telephone company having no knowledge that workman was to go on its lines held not bound to provide safe place for him to work.—Louisville Home Telephone Co. v. Beeler's Admr., Ky., 101 S. W. Rep. 397.

55. ELECTRICITY—Negligence.—The negligence of defendant in maintaining its electric wires in a defective condition on the roof of a building held to render defendant liable for an injury resulting therefrom to a police officer who went upon the roof in the night time in the discharge of his duty.—City of Greenville v. Pitts, Tex., 102 S. W. Rep. 451.

56. ELECTRICITY—Telephone Companies.—It was the duty of a telephone company to remedy a dangerous condition of its line caused by the proximity of electric wires, although belonging to another company.—Drown v. New England Telephone & Telegraph Co., Vt., 66 Atl. Rep. 801.

57. EMINENT DOMAIN—Appropriation of Land by Railroad.—The fact that the predecessor of a railroad company had appropriated land for an embankment or fill on certain premises did not debar the present company from appropriating additional lands for the purpose of raising such embankment.—Smith v. Cleveland, C., C., & St. L. Ry. Co., Ind., 81 N. E. Rep. 501.

58. EMINENT DOMAIN—Change of Street Grade.—Acts 1901, p. 272, ch. 153, amending Acts 1891, p. 67, ch. 81, held in conflict with Const., art. 1, § 2, in so far as it can be construed as denying to citizens compensation for the taking of property for public use without compensation.—Coyne v. City of Memphis, Tenn., 102 S. W. Rep. 355.

59. EMINENT DOMAIN—Property Previously Devoted to Public Use.—A proposed telephone and telegraph line along the right of way of a railroad held not to destroy or materially interfere as a matter of law with the public use to which the easement of the railroad was put.—American Telephone & Telegraph Co. v. St. Louis, I. M. & S. Ry. Co., Mo., 101 S. W. Rep. 576.

60. EMINENT DOMAIN—Setting Aside Award.—The court, in proceedings to condemn land for a railroad right of way, may set aside the judgment awarding damages for errors committed in granting an erroneous request submitted by plaintiff.—Union Ry. Co. v. Maulden Tenn., 102 S. W. Rep. 342.

61. EQUITY—Violation of Ordinance.—A bill in equity cannot ordinarily be maintained for the mere violation of a municipal ordinance, but the threatened act must amount to a nuisance.—Inhabitants of Houlton v. Titcomb, Me., 66 Atl. Rep. 733.

62. EVIDENCE—Admissibility.—In a suit by a corporation to enforce specific performance of an oral contract to convey land to complainant, it was proper to admit in evidence a book entry on plaintiff's journal showing the sale.—Meridian Oil Co. v. Dunham, Cal., 90 Pac. Rep. 469.

63. EVIDENCE—Expert Testimony.—A witness having 25 years' experience in the operation of drilling machines held competent to testify as to what mode of operation was the most dangerous.—Chicago, R. I. & G. Ry. Co. v. Denton, Tex., 101 S. W. Rep. 452.

64. EVIDENCE—Proof of Signature.—Signature to witnessed paper cannot be proven by one familiar with the handwriting where witnesses are not called. — North Penn Iron Co. v. International Lithoid Co., Pa., 66 Atl. Rep. 860.

65. EVIDENCE—Res Gestæ.—A statement by a locomotive engineer a half hour after he had run his train over and killed a person, made several miles from the point where the injury occurred, was not admissible as part of the *res gestæ*.—International & G. N. R. Co. v. Munn, Tex., 102 S. W. Rep. 442.

66. EVIDENCE—Self-Defense.—A person assaulted held to have the right to defend and the same right to stand his ground without retreating as if his life were in danger or serious bodily injury about to be inflicted.—Hix v. State, Tex., 102 S. W. Rep. 405.

67. EXCEPTIONS—Authority to Allow.—A judge has no authority to allow a bill of exceptions preserving the evidence heard before a referee, or to incorporate the same into a case-made, unless first made a part of the record by a bill of exceptions signed by the referee.—Iralson v. Stang, Okla., 90 Pac. Rep. 446.

68. EXECUTORS AND ADMINISTRATORS—Claims of Relatives —Claims against an estate by relatives for caring for decedent may be established only upon clear proof that the services were rendered under a mutual agreement for payment.—Hoskins v. Saunders, Conn., 66 Atl. Rep. 785.

69. FRAUD—Falsity and Knowledge Thereof.—A fraudulent purpose may be inferred from a willfully false statement in relation to a material fact, or from a recklessly false statement as of his own knowledge as to material facts susceptible of knowledge.—Goodwin v. Fall, Me., 66 Atl. Rep. 727.

70. FRAUDULENT CONVEYANCES—Husband to Wife.—A conveyance from a husband to his wife will not be set aside as fraudulent when the evidence disclosed that the husband was solvent at the time, and the provision made for his wife was reasonable even to existing creditors.—McMunnigal v. Aylor, Mo., 102 S. W. Rep. 486.

71. GARNISHMENT—Insurance Funds with State Treasurer.—Under Gen. Laws, 28th Leg. p. 166, ch. 109, §§ 6, 12, the securities placed in trust with the state treasurer by any insurance company incorporated or acting under the act may be garnished.—Robbins v. Midkiff, Tex., 102 S. W. Rep. 480.

72. GAS—Franchise.—A gas company held not relieved of liability to make payments to a city stipulated for in the ordinance granting it the right to use the city streets, though the city afterwards permitted other companies to use its streets.—City of Columbus v. Columbus Gas Co., Ohio, 81 N. E. Rep. 440.

73. GAS—Negligence.—In an action against a gas company for injuries received from escaping gas, *prima facie* proof on the question of negligence held made by showing the leak in the main and the consequent escape of gas, operating proximately to cause the loss.—Sipple v. Laclede Gaslight Co., Mo., 102 S. W. Rep. 608.

74. GUARDIAN AND WARD—Accounting.—A guardian may, if necessity requires, be allowed credit for expenditures from the principal of his wards' estate without obtaining authority from the court in advance.—*In re* Boyes' Estate, Cal., 90 Pac. Rep. 454.

75. HABEAS CORPUS—Contempt.—Where one has been committed for contempt, on petition for discharge by writ of *habeas corpus* he may not contradict the facts set forth in the order of commitment.—*Ex parte* Shortridge, Cal., 90 Pac. Rep. 478.

76. HABEAS CORPUS—Jurisdiction.—Where an infant was in the lawful custody of the father domiciled in Louisiana, his domicile was also in Louisiana, and a Texas court could not acquire jurisdiction of the child by reason of his temporary presence in the state of Texas.—Lanning v. Gregory, Tex., 101 S. W. Rep. 84.

77. HOMICIDE — Manslaughter.—Threats by decedent made a week or ten days before the homicide were insufficient to form a basis for excitement and passion, reducing the offense from murder to manslaughter.—State v. Edwards, Mo., 102 S. W. Rep. 520.

78. HUSBAND AND WIFE—Alienation of Affection.—The existence of the relation of parent and child constitutes no defense to an action for alienation of a husband's affections by his parent, where there was a malicious intermeddling and a deliberate attempt without cause to separate husband and wife.—Klein v. Klein, Ky., 101 S. W. Rep. 382.

79. INNKEEPERS—Duty to Provide Fire Escapes.—One who continued to occupy a room in a hotel for six months with knowledge that there were no fire escapes on the building did not waive compliance with the statute and ordinance requiring the erection of fire escapes — Adams v. Cumberland Inn Co., Tenn., 101 S. W. Rep. 428.

80. INTOXICATING LIQUORS — Sale to Minor.—Under Rev. St. 1899, § 3015 (Ann. St. 1906, p. 1728), held, in a trial for selling wine to a minor without the consent of his parent, etc., the state makes a *prima facie* case by proving a sale to a minor.—State v. Gary, Mo., 101 S. W. Rep. 614.

81. JUDGMENT—Default.—Where a default is taken on a bond, bill, or liquidated account signed by the parties, so that the amount may be ascertained by a simple calculation, judgment may be entered without the intervention of the jury, but in all other cases the jury must fix the amount.—State v. Thompson, Tenn., 101 S. W. Rep. 349.

82. JUDGMENT—Failure to Satisfy.—Where, in a suit by a trustee to enforce a lien on lands sold by him, plaintiff satisfied the lien on a parcel acquired by her, the trustee held liable for his failure to satisfy the lien against plaintiff after payment by her.—Field v. Yeaman, Ky., 101 S. W. Rep. 368.

83. JURY—Competency.—Members of a fraternal benefit society whose assessments would be affected by the result in a suit on a certificate issued by such society were disqualified to serve as jurors.—Edmonds v. Modern Woodmen of America, Mo., 102 S. W. Rep. 601.

84. JURY—Selection.—The court, after exhausting the regular venire in a capital case, has no right over the objection of accused to order an additional list of names to be drawn from the venire list of special jurors.—Gregg v. State, Tex., 100 S. W. Rep. 1161.

85. LANDLORD AND TENANT—Injury to Crops.—A lessor of land who is to receive a portion of the crop as rent for the land may sue for damages to the crop occasioned by the overflow of waters of a creek resulting from an embankment being erected thereon.—Gulf, C. & S. F. Ry. Co. v. Caldwell, Tex., 102 S. W. Rep. 461.

86. LANDLORD AND TENANT—Liability for Injuries Due to Defective Premises.—Where defendant transferred property reserving the rents and control for his benefit and his agent leased the premises to plaintiff, he was the proper party defendant in a suit for injuries due to the defective condition of the premises.—Meyers v. Russell, Mo., 101 S. W. Rep. 606.

87. LARCENY—What Constitutes.—Defendant held to commit larceny of fixtures to realty, though the severance and taking away was one continuous act.—State v. Wolf, Del., 66 Atl. Rep. 739.

88. LOGS AND LOGGING—Sale of standing Timber.—A buyer of standing timber, possessing rights to remove the timber over roads established by him, held entitled to maintain an action for interference with his use of the roads, though other places were open to him.—Boring Lumber Co. v. Roots, Oreg , 90 Pac. Rep. 487.

89. MASTER AND SERVANT—Defective Appliances —An employee does not assume the risk of dangers arising from the employer's negligence in furnishing defective machinery.—Harrod v. Hammond Packing Co., Mo., 102 S. W. Rep. 687.

90. MASTER AND SERVANT—Assumed Risk.—A brakeman who uses a defective coupling device for a year with knowledge of the defect held to assume the risk incident to its use.—Trinity & B. V. Ry. Co. v. Perdue, Tex., 101 S. W. Rep. 485.

91. MASTER AND SERVANT—Assumption of Risk.—A railway employee unloading a car on a side track held not to assume the risk of a negligent, unnecessary, and unusual jolt caused by a train being backed against the car.—Missouri, K & T. Ry. Co. of Texas v. Smith, Tex., 101 S. W. Rep. 458.

92. MASTER AND SERVANT—Assumption of Risk —An express messenger accepting employment from an express company requiring him to work on the railroad's trains assumed, as regards his employer, the risks incident to transportation.—Robinson v. St. Johnsbury & L. C. R. Co., Vt., 66 Atl. Rep. 814.

93. MASTER AND SERVANT—Duty to Warn of Danger.—In an action for death of an employee by being overcome by paint fumes while he was painting the inside of a locomotive tank, defendant held guilty of negligence in not warning him of the danger.—Houston & T. C. R. Co. v. Rutland, Tex., 101 S. W. Rep. 529.

94. MASTER AND SERVANT—Guarding Dangerous Machinery.—In an action by an employee injured in a saw mill, questions as to whether machinery was properly guarded and whether it was practicable to guard it held questions for the jury.—Boyle v. Anderson & Middleton Lumber Co., Wash., 90 Pac. Rep. 488.

95. MASTER AND SERVANT— Inexperience of Servant.—Where plaintiff was injured while operating a drilling machine, and it was shown that he had had several years, experience in the work, it was error to submit the issue of his inexperience to the jury.—Chicago, R. I. & G. Ry. Co. v. Denton, Tex., 101 S. W. Rep. 452.

96. MASTER AND SERVANT—Safe Place to Work.—The operator of a coal mine owes the duty to its servants to use ordinary care to prop the roof where they are working or the rooms adjacent thereto or in drawing the ribs between them.—Big Hill Coal Co. v. Abney's Adm'r, Ky., 101 S. W. Rep. 394.

97. MINES AND MINERALS—Construction of Lease.—Where a mining lease provides for the payment of a minimum royalty, the acceptance of such royalty is not a waiver of the right to forfeit the lease for ceasing to mine for one year.—Chauvenet v. Person, Pa., 66 Atl. Rep. 855.

98. MINES AND MINERALS—Support of Surface.—The common owner of the surface and the mineral estate may by contract relieve the owner of the mineral estate from any duty to support the surface, and from liability for any injury done to it by mining and removing of the minerals.—Miles v. Pennsylvania Coal Co., Pa., 66 Atl. Rep. 764.

99. MUNICIPAL CORPORATIONS—Building Regulation.—Violation of ordinances relating to erection and repair of wooden buildings in fire district held a nuisance, notwithstanding vote at special town meeting to permit the repairs.—Inhabitants of Houlton v. Titcomb, Me., 66 Atl. Rep. 783.

101. MUNICIPAL CORPORATIONS — Change of Street Grade.—An abutting owner whose easement of access to and from a street was impaired by a change in the grade of the street for ordinary travel and for the construction of an elevated railroad track held entitled to compensation.—Coyne v. City of Memphis, Tenn., 102 S. W. Rep. 355.

102. MUNICIPAL CORPORATIONS—Liability for Mistake of Officer.—A city engineer held not liable for work not covered by a contract for grading a city street which the contractor performed by reason of a mistake of the city engineer.—Wilson v. City of St. Joseph, Mo., 102 S. W. Rep. 600.

103. NEGLIGENCE — Imputed Negligence.—Negligence of the driver of a fire truck which contributed to a collision between the truck and a street car held not imputable to plaintiff, a fireman riding on the truck, but having no control over the driver.—Burleigh v. St. Louis Transit Co., Mo., 102 S. W. Rep. 621.

104 NEGLIGENCE—Pleading.—Where one act of negligence is well pleaded in a complaint, the same is sufficient to withstand demurrer for want of facts on a motion to make more definite and certain.—Grass v. Ft. Wayne & W. Valley Traction Co., Ind., 81 N. E. Rep. 514.

105. NUISANCE—Abatement.—The court after conviction of one for maintaining a nuisance by operating a poolroom held not to err in granting a motion of the commonwealth to abate the nuisance.—Respass v. Commonwealth, Ky., 102 S. W. Rep. 331.

106. NUISANCE—Injunction.—A municipal corporation as the representative of the equitable rights of its inhabitants may enjoin nuisances affecting matters with reference to which a portion of the power of the state has been confided to it.—Inhabitants of Houlton v. Titcomb, Me., 66 Atl. Rep. 783.

107. NUISANCE—Notice to Abate —Where a railroad company was maintaining a nuisance in defiance of a mandatory statute, notice to abate was not necessary before bringing suit against it.—Kelsay v. Chicago, C. & L. R. Co., Ind., 81 N. E. Rep. 522.

108. OBSCENITY — Indecent Publication.—Under Pen. Code, § 317, a publication in a newspaper attacking the confessional of the Roman Catholic Church held not indecent.—People v. Eastman, N. Y., 81 N. E. Rep. 459.

109. PARTNERSHIP—Liability on Note.—Where at the time plaintiff took a note signed by one partner with the names of both for a part indebtedness and plaintiff knew that the firm had been dissolved, plaintiff could not recover thereon.—Osborn v. Wood, Mo., 102 S. W. Rep. 580.

110. PARTY WALLS—Injunction to Protect.—A mandatory injunction held to lie to compel one of the owners of a party wall to close windows opened by him in the wall.—Coggins & Owens v. Carey, Md., 66 Atl. Rep. 678.

111. PRINCIPAL AND AGENT—Powers of Agent.—Where plaintiff delivered his horse to a special agent for some purpose connected with its sale, the agent had no apparent authority to exchange the horse for another horse and some money.—Kearns v. Nickse, Conn., 66 Atl. Rep. 779.

112. RAILROADS—Accident at Crossing.—In an action for death of a child at a railroad crossing, the negligence of the railroad company in failing to sooner stop the train after the engineer should have discovered the child's peril held the proximate cause of the accident.—Duggan v. Boston & M. R. R., N. H., 66 Atl. Rep. 829.

113 RAILROADS—Effect of Sale of Ticket to Passenger. —The sale of a ticket to a passenger amounts to a contract to carry him to the designated destination and let him off at that place, though it be merely a flag station. —Missouri, K. & T. Ry. Co. of Texas v. Glass, Tex., 102 S. W. Rep. 447.

114. RAILROADS—Frightening Animals.—The operatives of one of defendant's engines held negligent in prematurely starting the same before plaintiff, a licensee, could drive out of the railroad yard, resulting in plaintiff's injuries.—Cincinnati, N. O. & T. P. Ry. Co. v. Rodes, Ky., 102 S. W. Rep. 321.

115. RAILROADS—Nature of Switches.—In ascertaining whether a switch should be regarded as an integral part of a railroad's property or as an appurtenance to private land, the question to be determined is not who uses it, but who has the right to use it.—Richards v. Ferguson Implement Co., Mo., 102 S. W. Rep. 606.

117. RAILROADS—Negligence.—Contributory negligence is no defense to an action against a railroad company for the willful or wanton killing of plaintiff's intestate at a railroad crossing.—Lacey v. Louisville & N. R. Co., U. S. C. C. of App., 152 Fed. Rep. 134.

118. REFERENCE — Findings.—A referee should announce his findings and conclusions to the interested party in time to enable him to prepare his exceptions and preserve his record for review.—Iralson v. Stang, Okla., 90 Pac. Rep. 446.

119. REMOVAL OF CAUSES—Condemnation Proceedings.—A proceeding by a municipality to condemn private property for public use, is removable from the state to the proper federal court, where the conditions exist authorizing a removal under the removal acts.—Kansas City v. Hennegan, U. S. C. C., N. D. Mo., 152 Fed. Rep. 249.

120. REMOVAL OF CAUSES — Jurisdiction of Federal Court.—A federal court cannot acquire jurisdiction by removal of a suit in which such jurisdiction is dependent on diversity of citizenship, where neither of the parties is a resident of the district, and the plaintiff does not consent to such jurisdiction or waive his rights.—Southern Pac. Co. v. Burch, U. S. C. C. of App., 152 Fed. Rep. 168.

121. SALES—Delivery.—The setting apart of a certain quantity of lead in a warehouse on mining property is not a delivery under a general contract to deliver a certain quantity of lead f. o. b. at another place.—American Metal Co. v. Daugherty, Mo., 102 S. W. Rep. 538.

122. SCHOOLS AND SCHOOL DISTRICTS—Mandamus.—A trustee of a school district whose school had been abandoned could not be compelled by mandamus to furnish a conveyance for pupils to another district school.—Nelson v. State, Ind., 81 N. E. Rep. 486.

123. SEDUCTION—Punishment.—The imposition of punishment at seven years confinement in the penitentiary on finding accused guilty of seduction is not excessive.—Howe v. State, Tex., 102 S. W. Rep. 409.

124. SPECIFIC PERFORMANCE—Consideration.—A vendor who has accepted and retained the agreed consideration cannot question its adequacy in an action for specific performance.—Meridian Oil Co. v. Dunham, Cal., 90 Pac. Rep. 469.

125. STREET RAILROADS—Collision with Wagon.—The duty of the motorman to a street car passenger with reference to one driving a wagon along the street in the same direction as the car was going, stated.—Strong v. Burlington Traction Co., Vt., 66 Atl. Rep. 786.

126. STREET RAILROADS —Contributory Negligence.—In an action against a street railway company for injuries to a pedestrian struck by a car at a crossing, the contributory negligence of the pedestrian held not the proximate cause of the injury.—Grass v. Ft. Wayne & W. Valley Traction Co., Ind., 81 N. E. Rep. 514.

127. STREET RAILROADS—Indignity to Passenger by Conductor.—A passenger may recover from a carrier for the misconduct and insulting language of its conductor, without proof that such misconduct and insulting language were "negligently done."—San Antonio Traction Co. v. Davis, Tex., 101 S. W. Rep. 554.

128. STREET RAILROADS—Liability of Lessor.—A street railway company leasing its railway to another company held not liable for a collision between a vehicle and a car operated by the latter company.—Bensiek v. St. Louis Transit Co., Mo., 102 S. W. Rep. 587.

129. TELEGRAPHS AND TELEPHONES—What Law Governs.—In an action against a telegraph company for delay in delivering a message sent from Missouri to Texas, the laws of Missouri governed in determining the right of the plaintiff to recover.—Ligon v. Western Union Telegraph Co., Tex., 102 S. W. Rep. 429.

130. TRESPASS—Injury to Freehold.—Where plaintiff was not in possession at the time certain rock was thrown on his land by blasting operations conducted by defendant on adjoining land, plaintiff could only recover on proof of injury to the freehold.—Thurmond v. Ash Grove White Lime Ass'n, Mo., 102 S. W. Rep. 617.

131. TROVER AND CONVERSION—Damages.—The fact that one who had converted property returned it to the owner did not bar his right to damages for the conversion suffered in excess of the value of the property at the time of its return.—Plummer v. Reeves, Ark., 102 S. W. Rep. 376.

132 TRUSTS—Compensation of Trustee —The compensation of one appointed by the court as trustee to execute the provisions of a will must be limited to reasonable bounds, yet it is not necessarily the 5 per cent. allowed by statute to administrators and executors —Berry v. Stigall, Mo., 102 S. W. Rep. 585.

133. VENDOR AND PURCHASER—Bona Fide Purchasers.—Junior purchasers of land acquire no title to land against former unrecorded deeds, unless they purchase without notice of the prior deeds.—Whitaker v. Farris, Tex., 101S. W. Rep. 456.

134. WATERS AND WATER COURSES—Construction of Water Supply Contract.—City having failed to elect what faucets water company should supply under contract, the company held to have the right to make the election, and to charge for water furnished in addition.—Public Works Co. v. City of Old Town, Me., 66 Atl. Rep. 728.

135. WILLS—Construction —Where a will without latent ambiguity expresses a clear intent, the evidence of declarations of the testator to his attorney in the drawing of the instrument is inadmissible.—*In re* Dominici's Estate, Cal., 90 Pac. Rep. 448.

136. WILLS—Construction Against Intestacy.—A will bequeathing testator's property to his wife for life, the remainder, in case of the death of testator and the wife at the same time, to testator's children, held to entitle the children to take under the will on the death of the wife after having survived testator.—Sanger v. Butler, Tex., 101 S. W. Rep. 459.

137. WILLS—Election by Wife.—The acceptance and enjoyment by the widow of a provision in lieu of dower held to debar her from any share under the statute in testator's personal estate.—Harmon v. Harmon, Conn., 66 Atl. Rep. 771.

138. WILLS—Nature of Estate Devised.—Where testator devised certain land to V for life and the heirs of her body at her decease, the devisees in remainder took as heirs of the devisee of the particular estate, and not as purchasers under the testatrix.—Hastings v. Engle, Pa., 66 Atl. Rep. 761.

139. WILLS—Revocation.—Where a testator drew lines through clauses making a disposition of his property, such portions of the will were not revoked, unless the testator intended so to do.—Home of the Aged of the Methodist Episcopal Church v. Bantz, Md., 66 Atl. Rep. 701.

140. WILLS—Testamentary Capacity. — Where objections are filed to the probate of a will, the burden of establishing its due execution and testamentary capacity is on proponents, though if the attack is made after probate, the burden of proving the invalidity of the will is on contestants.—Steinkuehler v. Wempner, Ind., 81 N. E. Rep. 482.

141. WITNESSES—Deaf and Dumb Person.—A person deaf and dumb and possessing intelligence of a child about 10 years of age is a competent witness.—State v. Smith, Mo., 102 S. W. Rep. 526.

142. WITNESSES—Duty to Obey Subpœna.—A witness must obey his subpœna and be sworn before he can claim his privilege from giving evidence.—*In re* Consolidated Rendering Co., Vt., 66 Atl. Rep. 790.

143. WITNESSES—Husband and Wife.—In an action on a policy payable to the wife of the assured, she was incompetent to state a conversation she had had with her husband.—Dakan v. Mut. Life Ins. Co., Mo., 102 S. W. Rep. 634.

144. WITNESSES — Impeachment. — Where defendants offered themselves as witnesses, the state was authorized to impeach them by showing their low reputation for morality.—State v. Barnett, Mo., 102 S. W. Rep. 506.